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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAY AREA RAPID  
 TRANSIT DISTRICT,

Plaintiff,

vs.

GE TRANSPORTATION SYSTEMS  
 GLOBAL SIGNALING, LLC,

Defendant.

Case No. C-06-03749 JSW

**GE TRANSPORTATION SYSTEMS  
 GLOBAL SIGNALING, LLC'S  
 OPPOSITION TO BART'S MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

Date: May 14, 2010  
 Time: 9:00 a.m.  
 Courtroom: 11, 19th floor  
 Judge: Hon. Jeffrey S. White

Complaint Filed: June 13, 2006  
 Trial Date: August 30, 2010

AND RELATED COUNTER-CLAIM.

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1 require that the damage numbers match exactly, or that the pre-litigation claim be made with the  
 2 precision of a pleading, much less an expert declaration. Here, BART was notified that if it  
 3 walked away from the contract, GETS' claim would be approximately \$35.6 million. Sink Exh.  
 4 A (GETS March 4, 2003 cost estimate). These numbers are not materially different from what  
 5 appears in the Lechner report, which places a value of approximately \$37 million on GE's  
 6 counterclaims. The sufficiency of notice, therefore, is at best a contested issue to be resolved by  
 7 the trier of fact.

8 Moreover, even if there were no substantial compliance with the contract's claims notice  
 9 procedure, BART's motion would still fail for several additional reasons:

10 1. The contract's claims notice provision provides an express exception for the  
 11 contract's change order process, because the change order process serves the same effective  
 12 purpose as a claims notice. Here, the issues raised in GETS' claims were also the subject of a  
 13 change order and are, therefore, contractually exempted from the "notice of claims" procedure.

14 2. Under California law, claims notice provisions do not apply to contract  
 15 counterclaims, because when the government sues first on a contract, it shows that it has decided  
 16 that its investigation and negotiation is sufficient, and because it would be unfair for the  
 17 government to sue on a contract but not be subject to countersuit on the same contract.

18 3. Through its conduct of encouraging negotiation over the change orders, and never  
 19 complaining that GETS' notices of claims were late or insufficiently specific, BART waived, or  
 20 is estopped from asserting, the claims notice provisions.

21 For all of these reasons, BART's motion for summary judgment should be denied.

## 22 **STATEMENT OF FACTS**

### 23 **A. BART And Its Earlier Partners Designed A Flawed System.**

24 The Advanced Automatic Train Control system ("AATC") was the brainchild of now-  
 25 retired BART employee Eugene Nishinaga. Sink Exh. B (BART 30(b)(6) Nishinaga Depo.  
 26 23:18-24:24. He founded the research and development department of BART in 1991. *Id.* at  
 27 21:10-22:2. That same year, he contacted various companies to learn what technologies they  
 28 might have for determining the location of vehicles. *Id.* at 23:25-24:24. He learned of the

1 Hughes military radio-ranging technology and began discussions with them about using that  
2 technology to locate trains. *Id.*

3 In April 1993, BART completed the first set of specifications for the AATC system. *Id.* at  
4 51:20-23. BART wanted another company to invest, because the project “was perceived by our  
5 management at the time [as] a risky venture”; everyone at BART other than Nishinaga and his  
6 group thought AATC was “pie in the sky, highly risky . . .” *Id.* at 61:18-62:20. Nevertheless,  
7 using Defense Department funding to pay for the project, BART entered into an alliance with the  
8 joint venture of Hughes Aircraft and Morrison Knudsen. TAC ¶ 12.

9 For the next several years, Hughes and Morrison Knudsen worked on the AATC project  
10 with BART on the test track in Hayward. Bruen Exh. A<sup>1</sup> at 1-0151. By August 1997, when  
11 Hughes and Morrison Knudsen had withdrawn and Harmon signed a letter of intent, BART had  
12 spent an estimated 40,000 man hours in development (including over 3,000 hours by BART’s  
13 research and development group on the drafting of the AATC system technical requirements),  
14 Hughes and Morrison Knudsen had spent an estimated 314,140 hours, and the parties had used  
15 \$17 million in grant funds from the Department of Defense. Sink Exh. C, Exh. B at 191:13-21,  
16 174:3-25, 187:4-189:8. The project had completed a successful 1996 demonstration on the test  
17 track, “proving conceptually you can control vehicles through the air.” *Id.* at 88:22-89:5; 106:22-  
18 107:2. BART incorporated the aspects of the design that were developed on the test track as  
19 technical requirements in the 1998 contract with GETS. *Id.* at 144:17-145:16. But as Nishinaga  
20 now concedes, “At the time we thought they had gotten a lot further than they had gotten . . .” *Id.*  
21 at 107:16-108:6.

22 The technical requirements specified that the AATC system would rely upon certain  
23 elements of BART’s existing system. *See* Bruen Exh. A at pp. 1-0289 to 1-0496 (technical  
24 requirements). In order to understand the kinds of issues that came up in 2002 (which everyone  
25 agrees is when the project started to fall apart, and which are the basis of GETS’ claims), we  
26 identify two examples of how AATC uses elements of BART’s existing system here:

27  
28 <sup>1</sup> Rather than resubmitting the entire contract, we cite here to the Bruen Declaration in  
support of GETS’ motion for partial summary judgment, Exhibit A.



1 For example, BART required that the AATC system rely upon BART's existing track  
 2 circuit signals for "silent train" detection.<sup>2</sup> "Silent trains" are trains that don't have AATC radios  
 3 or have malfunctioning/non-working radios, and therefore cannot be detected by the AATC radio  
 4 technology. BART's AATC design depended upon BART's existing track circuits to generate  
 5 occupancy indications in order to locate these trains. Bruen Exh. A TR2.5.2, 2.5.2.1, and 2.5.2.2  
 6 at pp. 1-0305 - 306. BART further confirmed the reliability of using its track circuit system –  
 7 indeed, relying on one track circuit alone to detect silent trains – by issuing a change order that  
 8 told GETS to do just that. Sink Exh. D pp. 2-0412 - 413 (changes to TR2.5.2.1 and TR2.5.2.2).

9 BART's required use of the "key switch" on the train operator's console as a safety back-  
 10 up offers another important example of how the AATC design that BART set out in its  
 11 specifications depended on the reliability of BART's existing systems. Each BART train has a  
 12 control car at each end of the train, with a key switch that, when in the "on" position, designates  
 13 that car as the "lead" control car. Under the AATC design, the control cars at either end of the  
 14 train were also to be equipped with AATC radios, the location of which could be determined by  
 15 the wayside AATC equipment to determine the lead and tail ends of the train. A safety issue  
 16 could arise, however, if one of the two AATC radios failed, in which case the wayside equipment  
 17 would be unable to determine whether that radio was at the lead end of the train or the tail end.  
 18 BART specified that in this scenario: "The proper direction of a train shall be determined by  
 19 determining which end of the train has the key switch turned on." Bruen Exh. A at TR2.11.3.1, p.  
 20 1-0329. During the project, BART re-confirmed that the key switch indication sent by its train to  
 21 the AATC wayside equipment would support safety critical functions (i.e., in industry parlance,  
 22 that it would be "vital"). *Id.*; Sink Exh. E (BART 30(b)(6) Depo.) at 37:8-16.

23  
 24 <sup>2</sup> BART's existing train control system uses "track circuits" to, among other things,  
 25 determine the location of trains. A wire is attached to each of the two rails (not the electrified  
 26 third rail), and a second wire is attached to the rails some distance away (for example, 1/4 mile  
 27 away). Electricity is applied to this circuit and monitored. If a train comes onto that portion of  
 28 the track, the metal wheels/axles interfere with the circuit, causing the power measurement to fall  
 significantly. This is called "shunting." This information is sent back to the station computer,  
 which then knows that a train is "occupying" that particular portion of the track. The problem  
 with this system comes when trains "fail to shunt," so that no signal is sent even though a train is  
 present.

1           **B.     GETS Learned Of Problems And Complained.**

2           In 2002, as Phase 2 appeared near completion, BART began to identify numerous  
3 technical issues as result of its misleading and defective technical requirements. Because GETS  
4 had agreed to a fixed price contract in exchange for the right to exclusively license and market the  
5 AATC technology in the future, these technical issues put at risk all of GETS' costs to develop  
6 the AATC technology and the prospect of any reasonable return on that investment.

7           In May 2002, BART notified GETS that the keyswitch indication was in fact not "vital."  
8 Sink Exh. F (May 22, 2002 e-mail: "The Keyswitch Indication cannot ever be made a vital  
9 indication."). This was contrary to what BART engineers had previously believed and told  
10 GETS, and what BART's own safety consultant, Dr. James Ringland, had thought. *Id.* Exh. G  
11 (BART engineer David Lehrer 12/24/01 e-mail: "The VATC vitally reports the keyswitch  
12 indication."); *Id.* Exh. H (Ringland e-mail: "It looks like we all thought the keyswitch was  
13 vital."); *Id.* Exh. E (BART 30(b)(6) Depo.) at 211:25-213:8 (testifying that Oct. 24, 2001 e-mail  
14 was "not factual. It is not correct."); *Id.* at 203:5-208:24 (Lehrer "mea culpa," "The facts is the  
15 facts, yeah. I considered this a mistake on my part," "my thinking was warped at the time . . .");  
16 *id.* at 222:14-23.

17           In mid-July 2002, an even more serious problem was identified with the AATC system:  
18 its dependence on BART's track circuits. At a safety meeting on July 10, 2002, BART engineers  
19 reported to GETS for the first time that BART had at times observed a train passing through an  
20 entire track circuit undetected. *See* Sink Exh. I ("The statement was made that they [BART] do  
21 infrequently see persistent non-occupancy failures, which would prevent a silent train from being  
22 detected."). If true, this meant that a single track circuit could not be relied upon for the safety  
23 critical functions as directed by the contract, including "silent train" detection. BART agreed to  
24 further investigate this issue and recognized that a change order may be necessary. *Id.* ("This  
25 discussion may be an expansion of scope, but needs to be added to the list."). GETS immediately  
26 informed BART that this was a significant issue, stating that it would render the system  
27 "unbuildable" unless there was a change order to address the issue. Sink Exh. J at 192:16-194:25;  
28 Sink Exh. K at 319:2-320:21.

1 Although discussions over these issues were ongoing and phase 2 could therefore not be  
 2 completed, the parties were anxious to proceed with a partial victory. Sink Exh. L (LaBonte  
 3 Depo.) at 114:1-114:18; 120:21-121:21. GETS and BART wanted to market AATC to the  
 4 London Underground, which had put out an invitation to bid on providing a new train control  
 5 system. *Id.* BART also wanted to claim progress for political reasons, and show off the system  
 6 to others in the industry. *Id.* So the parties agreed to declare a partial success: BART would  
 7 obtain CPUC permission to operate trains in revenue service (using a highly qualified and limited  
 8 version of the system, “restricted mixed mode”) and exercise its option for Phase 3 of the project.

9 As part of this agreement, BART in late July 2002 signed one change order declaring  
 10 Phase 2 to be “substantially complete,” and a second one giving GETS notice to proceed with  
 11 Phase 3. Sink Exh. M (change order 97); Exh. N (change order 86). Change order 97 expressly  
 12 indicated that there were “open system issues” and a “punch list” remaining to be resolved, and  
 13 carved these items out from a release of claims. *Id.* Exh. M. Included in these open technical  
 14 issues that required resolution were the track circuit and keyswitch issues. *Id.*

15 In addition to BART’s amendment of its contract to specify its responsibility to resolve all  
 16 open system issues from Phase 2, BART’s executive manager for transit system development  
 17 Gary LaBonte also requested that GETS’ Phase 3 Project Manager, Lorne Harris, send BART a  
 18 formal letter detailing the specific Phase 2 technical issues that had been identified. The parties  
 19 had consciously pursued a policy of “no letter before its time,” which meant that the parties  
 20 should not send claim documents, but instead should focus on problem solving and follow-up  
 21 with letters only after the parties reach an understanding of how things will proceed. Sink Exh. K  
 22 at 216:4-217:22; Exh. O at 108:6-20 (general manager of BART, describing approach)

23 On August 2, 2002, two days after BART’s Notice To Proceed on the remaining Phase 3  
 24 work, GETS sent the requested letter in the form of a initial notice of potential claim as an  
 25 additional way of documenting and describing the problems. Sink Exh. P. Consistent with the  
 26 parties discussions and expectations, the letter also formally documented that GETS was  
 27 “requesting a change order be issued” to address the problems.<sup>3</sup> *Id.*

28 <sup>3</sup> That GETS would seek compensation about these issues weren’t a surprise to BART; they  
 GETS’ OPPOSITION TO BART MOTION FOR  
 PARTIAL SUMMARY JUDGMENT  
 - Case No. C-06-03749 JSW

**C. The Parties Talked For Years About GETS' Claims, And Potential Change Orders To Address The Issues, Before The Lawsuit Was Filed.**

The notices had the precise effect that they were supposed to have under the contract: they ensured that BART understood that a claim was possible so that BART could try to resolve the matter out of court.

In October 2002, BART management drafted findings of fact concerning some of GETS' notices of potential claims – and concluded that the potential claims were valid and that the contract should be amended by change orders. Sink Exh. R, S. As to the keyswitch issue, BART noted that GETS believed the keyswitch indication could be used for safety critical functions, confirmed that Change Order 85 had directed GETS to use it that way, and that this was a problem because “[i]t was discovered that the keyswitch on the vehicle is in fact non-vital.” Exh. R at B0276189. And on the issue of “silent train detection,” BART stated that it was “unable to find a rebuttal to GETS’ claim,” concluded that GETS was entitled to relief, and proposed to solve the problem by adding a new requirement to the contract. *Id.* (“Entitlement granted.”). The BART findings concluded by stating “As entitlement to these four claim items has been established, in accordance with Article GCP4.4.1.2 issue a Change Notice requesting a proposal.” *Id.* at B0276190; *see also* Exh. S (e-mail from BART’s project manager Morven MacLean: “BART finds there is entitlement on the following issues. Go ahead and submit cost and schedule proposals for these along with the other items . . .”). GETS confirmed: “These items will require change notices, since the [GETS] work scope within the present contract requirements cannot be implemented due to specification deficiencies.” Sink Exh. T.

Meanwhile, everyone focused on solving the problems and moving forward. BART issued change orders, modifying the contract to indicate that the issues were unsettled and would

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had been identified in the safety group’s meeting minutes, and expressly carved out from the declaration of phase 2 completion (and a release of claims) by change order 97. *See, e.g.*, Sink Exh. Q (internal BART e-mail in May 2002, attaching safety group meeting minutes, and stating “At some point we also need to determine which proposed changes are due to [GETS] mistakes (i.e. paid for by [GETS]) and which design changes are due to added or modified requirements (i.e. should be paid for by BART via one or more CNs [Change Notices].”); Exh. M (change order 97, including exception from release, punch list, “open systems issues”); Exh. P (handwritten notes on GETS’ August 2 claim document, indicating “yes” to some of them).

1 need further design changes to resolve. In Change Order 100, BART deleted the text of  
 2 TR2.5.2.2 (concerning silent trains) so that the contract provision now read only “TBD. Note:  
 3 Article TR2.5.2.2 will be revised in its entirety after finalization of the White Paper on Silent  
 4 Train Detection.” *Id.* Exh. U at 2-0488.<sup>4</sup> Once BART heard that the issues might result in a  
 5 change order for over \$8 million, it asked for additional paperwork to be submitted: a “thick file  
 6 to justify \$8 million.” *Id.* Exh. W (BART employee DuPont Depo.) at 259:8-263:11; *cf.* Exh. K  
 7 at 309:16-311:9 (BART’s LaBonte asked for a “very big stack of paper” he could take to the  
 8 board to justify expenditure as part of change order).

9 GETS then submitted an extensive submittal describing how BART’s faulty design  
 10 specifications had led to wasted work. Sink Exh. X. The document clearly indicated that GETS  
 11 would seek millions in compensation for BART’s bad specifications:

12 The contract specification is defective and the AATC system cannot be built as  
 13 specified.

14 It is [GETS’] position that BART was negligent by creating a design within the  
 15 TR’s [technical requirements] of the contract book that was dependent on, but not  
 16 supported by, the safety characteristics of the underlying existing ATC system  
 17 and compounded that error by continuing to approve the design and  
 18 implementation of an AATC system that was derived from the TR’s and that  
 19 continued to be dependent on features of the underlying ATC system that did not  
 support the required level of safety. The dependencies were clearly identified in  
 documents that were approved by BART at numerous points within the 4 years of  
 the Phase 2 program. The errant specification and subsequent approvals that  
 perpetuated the flawed design caused [GETS] to expend millions of dollars in  
 work that is now worthless and must be replaced.

20 *Id.* at p. 5.

21 In July 2003 BART sent a pair of letters responding to the “thick file” submittal. In one  
 22 letter, BART denied that it was liable for most of the issues raised by GETS; it now insisted that  
 23 GETS had been wrong about the flawed specifications. Significantly for purposes of this motion,  
 24 the denial was on the merits of the claim; no procedural insufficiency (for example, timing, or  
 25 documentation) was identified as to the key issues like track circuits and keyswitch. *See* Sink

26 <sup>4</sup> BART now tries to run from this language. BART’s executive manager for transit  
 27 development Gary LaBonte, who signed the document, testified “Shame on Gary. Gary never  
 28 picked up on that. I signed it without seeing that, understanding that.” Sink Exh. L (LaBonte  
 Depo.) at 201:16-18; Sink Exh. V (BART 30(b)(6) Depo.) at 558:18-19 (“BART did not realize  
 that change order 100 had changed this TR to TBD.”).

1 Exh. Y (BART engineer Lehrer Depo.) at 185:18-186:25 (relating to the matters that came up in  
2 mid-2002, “BART chose not to deny claims based on [48 hour deadline and cost estimate  
3 requirements].”); Exh. LL (BART 30(b)(6) Depo.) at 240:1-8.

4 By separate letter, BART asked for more information about some of the issues, and  
5 indicated that if it were provided sufficient information about why the prior work was now  
6 “wasted,” and more specifics about the fix going forward, it would grant the claim – again, it  
7 never raised any alleged procedural insufficiencies with the claim. Sink Exh. Z. Then, because  
8 both parties wanted to work on a solution instead of just a claims process, BART suspended the  
9 claims process while the parties worked on the precise terms of the change orders. *Id.* Exh. AA.

10 Much of the effort of the parties from 2003-2006 was then spent on what came to be  
11 known as Change Order 99, or “the Change Order Grande.” *See id.* Exh. L at 157:25-158:18;  
12 Exh. BB at 367:21-368:9; Exh. W at 253:5-23. An October 2003 “request for change” document  
13 identified the sixteen major issues that would be part of the Change Order Grande, and indicated  
14 GETS’ position that it would cost \$16.7 million to resolve them. GETS and BART drafted  
15 extensive “white papers” coming up with proposed technical solutions to BART’s design  
16 problems, to be included, along with a financial resolution, in the Change Order Grande. Exh. L  
17 at 181:13-183:20. As BART’s executive manager for transit system development testified, “No  
18 one was under the impression that we would settle this dispute without a change order –  
19 globally.” *Id.* at 184:14-18; *cf. id.* at 8:13-9:1; *see also* Exh. V (BART 30(b)(6) Depo.) at 556:7-  
20 18 (concerning silent train specification, “we were anticipating at the time that change orders 100  
21 through 102 were filed [in February 2003] that we would come to some mutually satisfactory  
22 resolution to the commercial issues and would file change orders that would then fill in those  
23 TBDs with something. Of course, we never got there. But that’s what – that was the intent of the  
24 time we filed change orders 100 through 102.”).

25 Unfortunately, BART didn’t follow through with the promised change orders. Once  
26 BART found out the price tag for the changes, it balked. *See, e.g.,* Exh. K at 327:5-329:5  
27 (describing the history generally).

28 At one point in early 2003, in preparing for a board meeting about the change orders,



1 BART specifically asked GETS “what if we walk away?” *Id.* at 347:10-350:17. BART hadn’t  
 2 yet said that it would walk away; everyone was still trying to solve the problems and move  
 3 forward (in which case, GETS would not have the claims it does now). GETS answered the  
 4 question in a letter dated March 4, 2003. Henderson Decl. ¶ 1; Sink Exh. A. After first  
 5 explaining the costs of going forward – around \$8 million for a release of any past claims, plus  
 6 the cost to correct the design – GETS included at BART’s request an analysis of “the cost to stop  
 7 work.” “The cost to stop work” is the precise subject of GETS’ counterclaims: i.e., the damages  
 8 to GETS because BART caused the project to fail, instead of fixing the design issues that it had  
 9 embedded in the contract through appropriate change orders. In the letter, GETS estimated that  
 10 the uncompensated costs it had incurred on the project to date were \$27,188,468, and that with  
 11 appropriate mark-ups for overhead and profit, GETS’ claim if BART abandoned the project  
 12 would be approximately \$35.6 million. Sink Exh. A. These numbers are not materially different  
 13 from what appears in the Lechner report, which checked the numbers and reports that the unpaid  
 14 contractual value plus costs invested and not reimbursed total \$27,119,154 (i.e., \$3,683,219 plus  
 15 \$23,435,935), and that adding in a reasonable return on GETS’ investment would in his opinion  
 16 bring the claim up to \$37 million. Stringer Decl. Exh. E (Lechner Report) at p. 15, table III-1.  
 17 The letter expressly noted that the number was a “quick calculation of rough order of magnitude  
 18 phase 2 costs” and that “If BART desires a formal determination of costs, please provide a formal  
 19 request.” BART never provided a formal request.<sup>5</sup> Henderson Decl. ¶ 2.

20 **D. In The Contract’s Final Days, GETS Re-Confirmed Its Contention To Pursue**  
 21 **A Claim Against BART If The Contract Did Not Go Forward.**

22 In 2006, when BART grew more hardened in its negotiation over potential change orders,  
 23 GETS let BART know, over and over again, that it regarded BART as in breach and that it would  
 24 make a claim in litigation.

25 In January 2006, BART lifted the suspension of the claims process, and indicated an

26 <sup>5</sup> BART was already aware of the rough order of magnitude. BART had, in a December  
 27 2002 internal meeting a few months earlier, used basically the same estimate internally. Sink  
 28 Exh. CC (internal BART meeting minutes: “Alternatives to AATC ¶ Cost to terminate contract  
 with GETS estimated at \$40M”).

1 intention to deny the claims, notwithstanding the earlier discussions of entitlement. GETS  
 2 responded by sending a “written objection,” which re-detailed the status of the open potential  
 3 claims. In light of BART’s indications that it might now walk away from the project, GETS  
 4 included language to put BART on notice that it would make a substantial claim (as it had earlier  
 5 let BART know). GETS wrote:

6 [GETS] formally objects to BART’s rejections of WNPCs 36 and 42, since both  
 7 of these WNPCs include actual out-of-scope costs already incurred by [GETS].

8 WNPC 36 included 3 categories of cost:

- 9 1) Phase 2 costs incurred by [GETS] on work performed in reliance on the  
 defective provisions contained within the Contract issued by BART,
- 10 2) Costs incurred by [GETS] supporting BART’s efforts to redefine the  
 technical and commercial project to resolve the identified BART interface issues  
 11 within BART’s stated budget constraints, and
- 12 3) Estimated cost for completion of the work specified by the draft technical  
 scope change language indicated by BART for future inclusion in Change Order  
 13 99, the Change Order allocated and planned by BART for this purpose.

14 Regarding the WNPC 36 category 1 costs, [GETS] objects to BART’s rejection  
 15 since [GETS’] Phase 2 work was performed in reliance on the defective  
 16 provisions contained within the Contract issued by BART. [GETS] is continuing  
 its efforts to finalize all of the costs incurred to date in this category.

17 Sink Exh. DD.

18 In early 2006, BART also sent a letter that it called a “request for adequate assurances,”  
 19 insisting that GETS agree to BART’s interpretation of disputed terms of the contract. Sink Exh.  
 20 EE. The request was improper and unreasonable; the proper procedure under the contract would  
 21 have been to ask GETS to proceed to perform the work according to BART’s interpretation, and  
 22 then have GETS claim for a “constructive change” decided later. Bruen Exh. A P4.4.3, 4.4.6 at  
 23 1-0039-40. But BART didn’t want to risk being stuck with the bill for completing AATC if its  
 24 interpretation was wrong, so BART framed its letter as a “request for adequate assurances.”  
 25 GETS responded by letting BART know that it was wrong and that it stood ready to perform the  
 26 contract. Sink Exh. FF at B0009974 (“GETS . . . is prepared and willing to carry out the  
 27 remainder of its work, as specified by BART’s contract.”). BART tried again. *Id.* Exh. GG. And  
 28 GETS again let BART know that it was wrong; wrong about how the contract was to be



1 interpreted, wrong about the history, and potentially liable for damages if the project didn't go  
2 forward. *Id.* Exh. HH.

3 Finally, GETS sent BART written notice of potential claim # 101. Sink Exh. II. The  
4 notice told BART that GETS regarded BART's conduct as preventing the continuation of Phase 3  
5 as contemplated by the contract, and reiterated GETS' intent to seek reimbursement for the  
6 substantial amounts of money it had expended on the project, all now potentially wasted because  
7 of BART's breach. *Id.* GETS remained hopeful that BART would relent – and because BART  
8 might have, it was “impossible for GETS to quantify the damages” “until the actual state of Phase  
9 3 is clarified.” But whether it was needed or not, written notice of potential claim # 101 gave one  
10 last notice to BART that if it wanted to negotiate about GETS' claims, the time was now.

11 Less than two weeks later, on June 13, 2006, BART sued GETS.

## 12 **ARGUMENT**

13 Summary judgment should be denied if the nonmoving party shows evidence “such that a  
14 reasonable jury could return a verdict” in its favor, “guided by the substantive evidentiary  
15 standards that apply to the case.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).  
16 Here that standard is readily met, and the motion should be denied.

### 17 **I. GETS GAVE PROPER NOTICE OF ITS REQUESTS FOR COMPENSATION.**

#### 18 **A. Standards Governing Evaluation Of Claims Notice Provisions.**

19 BART points to no case where a government contractor has been barred from bringing a  
20 claim in court based on failure to comply with a contract provision requiring notice of claims.  
21 Instead, it points only to the general legal structure: that government claims can be subject to a  
22 statutory bar, and that where a contract exists, the contract governs to the exclusion of the  
23 government claims statutory process. But as will be shown, GETS' written correspondence with  
24 BART throughout the 2002 to 2006 time period satisfies both the statutory government claims  
25 procedures (which are nowhere as stringent as BART suggests) and the requirements of contract  
26 law (which are nowhere as stringent as BART suggests). Under California law, the test is one of  
27 “substantial compliance” only, and claims against government entities are to be liberally  
28 construed where the statutory and contractual purpose – to give the government adequate notice

1 that it should investigate and negotiate – is satisfied. This is because courts in California seek to  
 2 avoid forfeiture of claims from alleged technical violations of notice requirements where notice  
 3 has been given, and in the absence of grossly negligent or willful failure by the defaulting party or  
 4 prejudice to the entity seeking enforcement, neither of which exists here.

5           1.       The Purpose Of The Claims-Notice Process Is To Initiate Investigation  
 6                       And Negotiation, So Precise Pleading Is Not Required; Even “Unspecified  
                       Damages” Will Satisfy The Rule.

7           As BART acknowledges, the purpose of requiring notice to the government of a potential  
 8 claim is to enable the public entity “to adequately investigate claims and to settle them, if  
 9 appropriate, without the expense of litigation.” *City of Stockton v. Superior Court*, 42 Cal. 4th  
 10 730, 738 (2007). Because the purpose is to initiate investigation and evaluation, the requirement  
 11 is not onerous. “[A] claim need not contain the detail and specificity required of a pleading, but  
 12 need only ‘fairly describe what [the] entity is alleged to have done.’” *Connelly v. County of*  
 13 *Fresno*, 146 Cal. App. 4th 29, 38 (2006) (quoting *Stockett v. Association of Cal. Water Agencies*  
 14 *Joint Powers Ins. Auth.*, 34 Cal. 4th 441, 446 (2004). California courts apply a doctrine of  
 15 “substantial compliance” with the claims notice requirement; the test is “whether the face of the  
 16 filed claim discloses sufficient information to enable the public entity to make an adequate  
 17 investigation of the claim’s merits and settle it without the expense of litigation.” *Id.*

18           BART tries to make much of the fact that GETS’ claim notices do not contain the exact  
 19 dollar amounts that appear, after four years of litigation, in GETS’ damages expert’s report.  
 20 Precision in the allegation of damages is not required for a valid claim. In *Connelly*, 146 Cal.  
 21 App. 4th 29 (2006), an auto accident victim filed a claim indicating that a county employee had  
 22 run a stop sign and hit her truck, and in response to the question “What injuries or damages did  
 23 you suffer?” stated “Damage to my ’96 Chevy S-10 pickup – car rental until my truck is replaced.  
 24 *Unspecified Medical, Lost Income, future Medical.*” *Id.* at 41 (emphasis added). The county  
 25 argued that the claimant should have at least specified that the injury was to her neck, but the  
 26 argument was rejected. “Even if we were to agree her failure to describe whatever symptoms she  
 27 was suffering from when she filed her claim rendered it technically deficient, we do not agree she  
 28 failed to satisfy the test of substantial compliance. This is because she stated adequate

1 information on the form to advise the County that she suffered personal injuries in the accident.”  
 2 *Id.* at 42. The use of the term “unspecified” in her form did not render it “hopelessly vague”;  
 3 instead, it alerted the County that they should investigate the claim and settle it if it chose to do  
 4 so. *Id.* Summary judgment in favor of the County was therefore reversed. *Id.* at 43. *See also*  
 5 *Ocean Services Corp. v. Ventura Port Dist.*, 15 Cal. App. 4th 1762, 1777-1778 (1993) (rejecting  
 6 defendant’s argument that judgment should be reduced from \$31 million to \$1 million set forth in  
 7 notice of claims).

8 Nor is the precise legal theory required to be spelled out. In *Ocean Services Corp.*, 15  
 9 Cal. App. 4th 1762 (1993), the court held that a claim alleging breach of a commercial lease was  
 10 sufficient to satisfy the requirement for a later lawsuit based on breach of the implied covenant of  
 11 good faith and fair dealing. *Id.* at 1777; *cf. Stevenson v. San Francisco Hous. Auth.*, 24 Cal. App.  
 12 4th 269 (1994) (tenant’s claim against housing authority for premises liability and breach of  
 13 contract supported later complaint for negligent failure to disclose latent defects, negligence, and  
 14 breach of statutory duty to inspect building for safety before earthquake).

15 2. A Condition That Leads To Forfeiture Of Contract Rights Must Be  
 16 Construed To Avoid Forfeiture.

17 “A condition involving a forfeiture must be strictly interpreted against the party for whose  
 18 benefit is created.” Cal. Civ. Code § 1442; *Universal Sales Corp. v. California Press Mfg. Co.*,  
 19 20 Cal.2d 751, 771 (1942) (“Forfeitures are not favored by the courts, and if an agreement can be  
 20 reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it.”). This  
 21 rule of construction applies to public entities as well as private ones. *Milovich v. City of Los*  
 22 *Angeles*, 42 Cal. App. 2d 364, 372-375 (1941); Cal. Civ. Code § 1635; Witkin, 1 *Summary of*  
 23 *Cal. Law*, Contracts § 991 (10th ed. 2009) (“Contracts of the state or its agencies and other  
 24 governmental bodies are interpreted in the same manner and under the same rules of construction  
 25 as private contracts.”). It has been applied to avoid the effect of claims-notice requirements in  
 26 public construction contracts in the absence of prejudice. *Milovich*, 42 Cal. App. 2d at 372-375.

27 Even where a contractual forfeiture condition cannot be avoided through interpretation,  
 28 California Civil Code section 3275 provides that enforcement may be refused in the absence of

1 gross negligence, willfulness, or fraudulent conduct – instead, the remedy for breach of the  
2 condition is limited to the actual damages that resulted from the breach:

3 Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a  
4 loss in the nature of a forfeiture, by reason of his failure to comply with its  
5 provisions, he may be relieved therefrom, upon making full compensation to the  
other party, except in case of a grossly negligent, willful, or fraudulent breach of  
duty.

6 Cal. Civil Code § 3275; Witkin, 1 *Summary of California Law*, Contracts § 827 (“Where the  
7 provision requiring a forfeiture is express and cannot be avoided by construction, the court may,  
8 in a proper case, excuse the condition or give equitable relief against its enforcement.”) (citing  
9 Civil Code § 3275 and cases); *see also Lauderdale Assoc. v. Dept. of Health Servs.*, 67 Cal. App.  
10 4th 117 (1998) (awarding reimbursement for skilled nursing services despite failure to comply  
11 with pre-approval process in the Medi-Cal regulations, based on the anti-forfeiture rule of Civil  
12 Code § 3275) (abrogated as to Medi-Cal cases by Cal. Welf. & Inst. Code § 14018.5); *Valley*  
13 *View Home of Belmont v. Dept. of Health Servs.*, 146 Cal. App. 3d 161, 168 (1983) (“Relief from  
14 forfeiture when the facts and equities militate in favor thereof may be granted even when the  
15 party seeking it has violated an express condition precedent, such as where time is made of the  
16 essence.”) (also abrogated as to Medi-Cal cases by Welf. & Inst. Code § 14018.5). This policy  
17 against enforcement of forfeiture clauses applies to government contracts with the same force as  
18 it applies to private ones. *M.F. Kemper Constr. v. City of Los Angeles*, 37 Cal.2d 696, 704-05  
19 (1951) (“California cases uniformly refuse to apply special rules of law simply because a  
20 governmental body is a party to a contract”; refusing to enforce city charter providing for city’s  
21 retention of 10% of contract price if successful bidder refused to enter contract as forfeiture where  
22 bidder made good faith mistake justifying rescission).

23 California law is, on this point, substantially similar to the law elsewhere in the United  
24 States. In the Restatement of Contracts, Second, the American Law Institute states the rule as:  
25 “To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a  
26 court may excuse the non-occurrence of that condition unless its occurrence was a material part of  
27 the agreed exchange.” Rest. 2d Contracts § 229; *Nortel Networks, Inc. v. Gold & Appel Transfer*  
28 *S.A.*, 298 F.Supp.2d 81, 86 (D.D.C. 2004) (“Typical of conditions that may be immaterial are

1 ‘those which may be thought of as procedural or technical, or . . . conditions which merely relate  
2 to the time or manner of the return performance or provide for the giving of notice or the  
3 supplying of proofs.’”) (quoting Rest. 2d Contracts § 84 cmt. d). The illustrative example used in  
4 the Restatement is instructive here:

5 2. A, an ocean carrier, carries B’s goods under a contract providing that it is a  
6 condition of A’s liability for damage to cargo that “written notice of claim for loss  
7 or damage must be given within 10 days after removal of goods.” B’s cargo is  
8 damaged during carriage and A knows of this. On removal of the goods, B notes  
9 in writing on the delivery record that the cargo is damaged, and five days later  
10 informs A over the telephone of a claim for that damage and invites A to  
11 participate in an inspection within the ten day period . A inspects the goods  
within the period, but B does not give written notice of its claim until 25 days  
after removal of the goods. Since the purpose of requiring the condition of  
written notice is to alert the carrier and enable it to make a prompt investigation,  
and since this purpose had been served by the written notice of damage and the  
oral notice of claim, the court may excuse the non-occurrence of the condition to  
the extent required to allow recovery by B.

12 Rest. 2d Contracts § 229 ill. 2, at p. 186 (1981); see *Delaware Steel Co. v. Calmar Steamship*  
13 *Corp.*, 378 F.2d 386 (3d Cir. 1967) (on which this illustration is based).<sup>6</sup>

14 **B. GETS Complied With The Contractual Provisions Governing Claims.**

15 Under the legal standards set forth above, there is ample evidence that GETS adequately  
16 complied with its obligation to give notice to BART before bringing suit.

17 As discussed above, GETS’ claim for its lost investment developed over time and did not  
18 completely materialize until BART abandoned the parties’ multi-year effort to develop design  
19 fixes. But throughout the parties’ efforts to address the defects in the design specifications, GETS  
20 gave repeated notice to BART both in formal “notices of potential claim” and other contract  
21 correspondence (1) of its claim that the contract had contained defective specifications and the

22 <sup>6</sup> The rule is the same under federal claims law. *Brinderson Corp. v. Hampton Roads*  
23 *Sanitation Dist.*, 825 F.2d 41, 44 (4th Cir. 1987) (“[I]n the Court of Claims and in several boards  
24 of contract appeals . . . the notice provision has not been given a literal construction. A more  
25 liberal approach, focusing on the purpose of the clause, has been adopted. Generally, when the  
26 owner has actual or constructive notice of the conditions underlying the claim and an opportunity  
27 to investigate, that is sufficient.”) *Calfon Constr., Inc. v. United States*, 18 Cl. Ct. 426, 439 (1989)  
28 (“If the contracting officials have knowledge of the facts or problems that form the basis of a  
claim and are able to perform necessary fact-finding and decision making, the Government is not  
prejudiced by the contractor’s failure to submit a precise claim at the time a constructive change  
occurs.”); *Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972) (“notice  
provisions in contract-adjustment clauses [should] not be applied too technically and illiberally  
where the Government is quite aware of the operative facts.”).

1 specific defects on which the claim is based, (2) that GETS' damage claim would be based on the  
 2 value of its "wasted work," with a mark-up to account for overhead and profit that would have  
 3 been earned had GETS spent its resources elsewhere, and (3) that if the project was not completed  
 4 the claim amount would be in the range of \$27 million for the unreimbursed out-of-pocket costs,  
 5 and over \$35 million when overhead and profit were considered. *See* Statement of Facts, *supra*,  
 6 sections B and C. This more than satisfied the contract's core claims notice requirement that  
 7 GETS provide "sufficient detail to enable the Engineer to ascertain the basis and amount of said  
 8 potential claim." P.9.6.1(c). And it certainly provides ample proof of "substantial compliance"  
 9 sufficient "to enable the public entity to make an adequate investigation of the claim's merits and  
 10 settle it without the expense of litigation." *Connelly*, 146 Cal. App. 4th at 38.

11 Indeed, BART was well aware that GETS had indicated it had potential claims against  
 12 BART, and BART investigated the claims, considered them meritorious, and only decided not to  
 13 pay to change the contract when they found out how expensive the fix would be. While some of  
 14 the correspondence indicated that the exact amount of damages remained to be determined –  
 15 which made sense, since the contract was still ongoing, and the parties were discussing various  
 16 fixes – BART was also given a "rough order" of magnitude of the claim indicating that if the  
 17 project ended, GETS intended to claim for \$27,188,486 in unreimbursed out-of-pocket costs, plus  
 18 an additional amount for return on investment, and was told that it could have additional  
 19 specificity if it wanted. Sink Exh. A (March 4, 2003 letter); *see also* Sink Exh. DD (BART  
 20 internal meeting minutes, estimating cost to terminate GETS at "\$40M"). These preliminary  
 21 damage numbers are not materially different from what appears in the Lechner's opinion, which  
 22 reports that the unpaid contractual value plus costs invested and not reimbursed total  
 23 \$27,119,154, and that adding in a reasonable return on GETS' investment would in his opinion  
 24 bring the claim up to \$37 million. Stringer Exh. E (Lechner Report) at p. 15, table III-1.

25 Moreover, any differences in the damage estimates prepared by GETS during this process  
 26 did not discourage BART from investigating GETS' claims and negotiating a potential resolution  
 27 through the change order process. BART literally spent years negotiating potential changes to  
 28 remedy the design defects that formed the basis of GETS' claims, knowing full well the



1 magnitude of these issues. And when BART did indicate its intention to abandon the project,  
 2 GETS also gave additional written notices in 2006 (the written objection to BART's denial of  
 3 claims, and written notice of potential claims # 101) letting BART know that it would hold BART  
 4 liable for the value of its wasted work, though the amount had not been calculated with precision.

5 There is simply no doubt that a trier of fact could, and quite likely would, find substantial  
 6 compliance based on this evidence. Summary judgment should not be granted.

7 Finally, to the extent that there is any deficiency in the claims notices given – and GETS  
 8 contends there is none – the minor deficiencies should not be used to bar a potentially meritorious  
 9 \$37 million claim. That would be using the notice provision as a forfeiture, which California  
 10 courts repeatedly refuse to do and the Civil Code expressly discourages. There is no undisputed  
 11 evidence or argument establishing that GETS was grossly negligent or willful, or that it acted  
 12 fraudulently in presenting its claims to BART. Quite the contrary, GETS attempted to put BART  
 13 on notice of its concerns and claims while abiding by the “no letter before its time” policy that the  
 14 parties had mutually adopted. Nor has BART pointed to any conceivable prejudice resulting from  
 15 any alleged technical deficiencies in the claims notices: BART had every opportunity to  
 16 investigate and negotiate these claims in advance of litigation, and spent years doing so.<sup>7</sup> But the  
 17 decision of whether to grant relief from forfeiture is for another day. The court can wait until the  
 18 full factual record is developed. In the meantime, it is enough to say that there are material issues  
 19 of disputed fact that prevent summary judgment based on BART's claims-notice argument.

20 **II. THE CLAIMS NOTICE PROVISION DOES NOT APPLY IN ANY EVENT**  
 21 **BECAUSE THE ISSUES WERE RAISED IN THE CHANGE ORDER CONTEXT.**

22 Section P.9.6 of the contract provides:

23 The Supplier shall not be entitled to any additional compensation or damages  
 24 otherwise payable or to extension of time for completion as a result of any act or  
 25 failure to act by the Engineer or the District, the happening of any event or  
 26 occurrence, or any other cause, unless the Supplier shall have given the Engineer  
 a written Notice of Potential Claim therefor as hereinafter specified and shall have  
 complied with the other requirements specified in this Article P9.6; **provided,**  
**however, that a Notice of Potential Claim will not be required for protests**

27 <sup>7</sup> Indeed, a jury could readily infer lack of prejudice to BART from the fact that BART  
 28 never complained about problems with the process, as opposed to the content, of the claim. Exh.  
 LL (BART 30(b)(6) Depo. at 240:1-9.

1           **made in accordance with the change procedures of Article P.4.4 until the**  
 2           **completion of the procedures set forth in such Article.**

3           Bruen Exh. A, P.9.6, p. 1-0056 (emphasis added). In short, there's a "change order exception" to  
 4           the claims notice requirement.

5           Article P4.4 and the sections that follow it describe the change order process: they  
 6           provide that the District can make changes to the contract documents, and to require changes to  
 7           be made in the extent or manner of performance of the Work. Among these sections are  
 8           provisions that state that if the District issues a change order and the Supplier disagrees with any  
 9           of its terms, the Supplier should indicate "protested" on the change order and return it; the parties  
 10          then enter into a process for resolving the terms of compensation. *Id.* P4.4.4 and P4.4.4.1, p. 1-  
 11          0039. The intent of the P9.6 change order exception, therefore, is to indicate that the change  
 12          order process provides another avenue for potential claims and disputes to be addressed.

13          The particular issues that resulted in GETS's counterclaims were all issues raised in a  
 14          change order process. *See* pp. 7-10 above; Sink Exh. K at 312:19-314:12 ("And the initial  
 15          expectation, based our discussions with BART, was that this was going to be a quick process, and  
 16          that it was going to be resolved through a change order."). The record demonstrates that the  
 17          parties spent years negotiating potential change orders and terms of compensation for the design  
 18          flaws in the AATC specifications (most significantly, Change Order 99 aka "Change Order  
 19          Grande"). The "protest" mechanism per se was never triggered formally because the parties  
 20          chose to work collaboratively to develop design fixes and an agreed change order, rather than  
 21          BART unilaterally issuing a change order without GETS' agreement, and because BART  
 22          ultimately refused to issue any change order once the design fixes were identified and priced, but  
 23          the net effect was the same. BART certainly understood that GETS "protested" further work on  
 24          the project without remedial change orders and compensation, and the primary process that the  
 25          parties chose to address this impasse was the change order process.

26          The effect of the "change order exception" is to take most disputes about the contract  
 27          itself, or disputes about the best approach to finishing the project, out of the claims process.  
 28          Other kinds of claims – for example, if a BART employee accidentally destroyed some GETS



1 equipment – would more appropriately be addressed through the P9.6 claims process. *See* Bruen  
 2 Exh. A at P9.6.3, P9.7, P.9.7.3, p. 1-0058 (providing for claims to be deferred and paid in  
 3 conjunction with final invoice); *see, e.g.*, Sink Exh. JJ (negotiation regarding track access claims).  
 4 Those claims are based on events, and thus the contract’s provision for bringing a claim within 48  
 5 hours “following the occurrence of the event on which the potential claim is based,” with “as  
 6 much information concerning the event and its impact on cost or schedule,” make perfect sense.  
 7 Bruen Exh. A at P.9.6.1. But when the problem is not an event occurring during the contract, but  
 8 instead deficiencies in the contract specifications themselves – that BART’s technical  
 9 requirements were flawed – then the language of P9.6.1 is ill-fitting (because it could otherwise  
 10 be read to require that a notice of claim be filed within 48 hours of the signing of the contract; the  
 11 “occurrence of the event on which the potential claim is based” is arguably the bad contract  
 12 specification itself). The contract is better read to require that the parties should raise and  
 13 confront design issues in the change order process. BART is then given notice and an  
 14 opportunity to investigate and negotiate, and consider making a change to the contract to mitigate  
 15 the impact, GETS is encouraged to focus on a workable solution instead of a potential litigation  
 16 claim, and the success of the project is encouraged. An interpretation of the contract that pushes  
 17 design flaw issues into the change order process instead of the notice-of-claims process is  
 18 therefore consistent with the contract’s language and with the parties’ conduct. Cal. Civ. Code §  
 19 1641 (“The whole of a contract is to be taken together, so as to give effect to every part, if  
 20 reasonably practicable, each clause helping to interpret the other.”); *Southern Cal. Edison Co. v.*  
 21 *Superior Court*, 37 Cal. App. 4th 839, 851 (1995) (“how the parties performed can show that the  
 22 contract is reasonably susceptible to the interpretation that is consistent with their actions”);  
 23 *Universal Sales Corp.*, 20 Cal. 2d at 761 (“a construction given to it by the acts and conduct of  
 24 the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is  
 25 entitled to great weight, and will, when reasonable, be adopted and enforced by the court.”).

26 In short, while GETS issued notices of potential claim in an abundance of caution, the  
 27 parties recognized that the primary avenue for resolving the design flaws was the change order  
 28 process and that remained their focus until the end. In so doing, they effectively removed the

1 dispute from the claims notice provisions.

2 **III. THE CLAIMS NOTICE PROVISION DOES NOT APPLY BECAUSE BART**  
 3 **SUED FIRST.**

4 Alternatively, the motion should be denied because claims notice rules do not apply when  
 5 the government agency sues first. As held in *People ex rel. Dept. of Parks and Recreation v.*  
 6 *West-A-Rama, Inc.*, 35 Cal. App. 3d 786, 794 (1973), when the public entity brings suit on a  
 7 contract and the other party to the contract responds by filing affirmative claims for damages  
 8 regarding the same contract, the claims notice rules do not apply.

9 In *West-A-Rama*, the State sued first on a contract. *Id.* at 788. West-A-Rama filed a  
 10 cross-complaint, making an affirmative claim back against the State for damages. *Id.* at 789. The  
 11 trial court granted a demurrer to West-A-Rama's cross-claim because it had never filed a claim  
 12 under the Government Code. *Id.* The Court of Appeal reversed. It held that the purpose of the  
 13 claims statutes is to permit the government to investigate and have an opportunity to settle  
 14 without litigation. *Id.* at 794. When the government initiates the lawsuit, then the government  
 15 "presumably made a full investigation of the respective rights and duties of the parties before  
 16 initiating suit," and "already made the decision that the claim should not be settled." *Id.*

17 Since sovereign immunity is not involved [because it does not apply to contract  
 18 cases] and the purposes of the claims statutes have been satisfied, there is no  
 19 reason to insist upon compliance with the claims statutes as a prerequisite to  
 20 West-A-Rama's cross-complaint for monetary damages on the contract. On the  
 21 contrary, it is manifestly unjust to allow [the government agency] to bring suit  
 upon a contract and then to use what amounts to a notice statute to shield itself  
 from a cross-complaint asserted by the defendant in the same suit and arising  
 from that very contract.

22 *Id.*<sup>8</sup>; see also *Frank Briscoe Co. v. Clark County*, 857 F.2d 606, 609-611 (9th Cir. 1988) (under  
 23 Nevada law, compulsory counterclaims may be brought against the government without  
 24 compliance with Nevada's notice-of-claim statute, because statutory purpose of avoiding surprise

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 26 <sup>8</sup> The *West-A-Rama* case was later expanded beyond the contract context to cross-claims for  
 27 indemnity in tort cases, see *Krainock v. Superior Court*, 216 Cal. App. 3d 1473 (1990). But the  
 28 exception does not extend to affirmative "cross-claims" filed by the person who initiated the  
 lawsuit. See *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 745 (2007); *Pacific Gas & Elec.*  
*Co. v. City of Union City*, 220 F.Supp.2d 1070, 1078 (N.D.Cal. 2002) (declining to extend *West-*  
*A-Rama* to claims in a complaint, as opposed to a counterclaim).

1 is satisfied when government sues, and it would be unjust to bar compulsory counterclaims based  
 2 on notice-of-claim requirement); *cf. Frederick v. United States*, 386 F.2d 481 (5th Cir. 1967)  
 3 (where government filed suit, claims-notice requirement of 28 U.S.C. § 2406 does not apply  
 4 because government cannot claim surprise, but federal sovereign immunity law limits  
 5 counterclaim to amount of government's claim and prevents affirmative relief).

6 The same reasoning applies here. The purpose of the notice provision in the contract was  
 7 no different from the notice provision in the Government Claims Act; indeed, the whole point of  
 8 the claims notice provisions in the contract is to set up a scheme that will accomplish the same  
 9 purposes as the statutory claims notice requirements – one that will provide the public entity the  
 10 opportunity to investigate the facts, and in appropriate cases, settle before litigation. *Arntz*  
 11 *Builders v. City of Berkeley*, 166 Cal. App. 4th 276, 289 (2008) (“A contractual claims procedure  
 12 will amply serve those purposes because the public entity can include in the contract any  
 13 reasonable requirements it deems necessary to accomplish them.”); *Cory v. City of Huntington*  
 14 *Beach*, 43 Cal. App. 3d 131, 136 (1974) (“Similarly, where the statutory purpose has been  
 15 realized by other means, strict compliance [with the Government Claims Act] has not been  
 16 required.”; citing *West-A-Rama*). Because the purpose of the claims provision in the contract is  
 17 satisfied when BART brings suit first – BART has had the opportunity to investigate and settle to  
 18 avoid litigation over the parties' respective rights on this contract, and indeed, spent over three  
 19 years trying to do just that – the counterclaims are properly brought even if there was no  
 20 compliance at all with the claims provisions (and there was, as discussed above).

21 Moreover, as held in *West-A-Rama*, it would be “manifestly unjust” to allow BART to sue  
 22 on the contract but be able to use its notice provisions to avoid an affirmative counterclaim  
 23 arising out of the same contract. “A contract must be given such an interpretation as will make it  
 24 . . . reasonable . . . if it can be done without violating the intention of the parties.” Cal. Civ. Code  
 25 § 1643. Because the intention of the parties is to give notice and an opportunity for investigation  
 26 and avoidance of litigation, by creating a claims notice system to supplant the Government  
 27 Claims Act, the claims notice provision should be interpreted not to apply to contract-based  
 28 counterclaims, just as the Government Claims Act does not so apply. BART offers no rationale

1 for why it should be immune from liability on the counterclaims, when all of the legitimate  
2 purposes of a notice-of-claim requirement have already been satisfied.

3 Finally, BART's argument that the claims cannot be offered on a "set-off" theory is  
4 baseless. If BART pursues its claims for rescission (counts 1 and 3) to judgment, trying to put the  
5 parties back into the position they had before the contract began, then the evidence of the amount  
6 of GETS' unreimbursed costs in the project are certainly relevant to "adjusting the equities." Cal.  
7 Civ. Code § 1692 ("the court may require the party to whom [rescission] is granted to make any  
8 compensation to the other which justice may require and may otherwise in its judgment adjust the  
9 equities between the parties."). As for using the counterclaim to offset damages on BART's  
10 count 2 claim for breach of contract, the argument likewise fails. BART's argument is contrary  
11 to *West-A-Rama* and *Krainock*, as BART itself recognizes. BART's attempt to block a purely  
12 defensive claim based on the language of P9.6.4 likewise fails; a purely defensive counterclaim is  
13 not a "claim," "right to compensation," "damages," or "any other relief."<sup>9</sup> It is merely a denial or  
14 reduction of BART's (as opposed to GETS') claim for damages, compensation, or relief.

15 **IV. A REASONABLE FACT-FINDER COULD CONCLUDE THAT THE CLAIMS-**  
16 **NOTICE PROVISIONS WERE WAIVED, OR THAT BART IS ESTOPPED TO**  
**ASSERT THOSE PROVISIONS AS A BAR.**

17 A condition can be waived. *See, e.g.,* Witkin, 1 Summary of California Law, Contracts §  
18 823 p. 912 ("A condition may be waived . . . The waiver may be an express statement, or it may  
19 be implied, as where the party entitled to certain performance accepts partial or defective  
20 performance."); *Galdjie v. Darwish*, 113 Cal. App. 4th 1331, 1339 (2003) ("Like any other  
21 contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they  
22 are made."); *cf. Rand v. Andreatta*, 60 Cal. 2d 846 (1964) ("Estoppel may be used in a proper  
23 case to excuse the late filing of claims against public entities or the filing of such claims in a  
24 defective form. . . . [E]stoppel may likewise be used to excuse no notice."). Thus, even if the

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26 <sup>9</sup> This reading also reconciles the language with P9.6, which appears to describe the same  
27 concept as P9.6.4, but describes the claims-notice forfeiture rule as applying to "additional  
28 compensation or damages otherwise payable . . ." Bruen Exh. A P9.6.4, p. 1-0058. Moreover, to  
the extent there is any ambiguity here about whether "any other relief" could encompass the  
"relief" of denying BART's claim, such ambiguity is construed against forfeiture, as set forth in  
section I.A.2 above.

1 court finds that it is undisputed that GETS did not timely submit an adequate statement of its  
 2 claim through the claims process or the change order process (which is disputed, see above), the  
 3 case should still go to the jury on the question of whether BART waived the condition that GETS  
 4 submit its claim through a formal written notice. *See, e.g., Engalla v. Permanente Medical*  
 5 *Group, Inc.*, 15 Cal. 4th 951, 983 (1997) (whether contract right was waived is question of fact).

6 First, BART waived the condition by encouraging GETS not to file claims within 48  
 7 hours after learning of problems. The parties agreed to a policy of “no letter before its time,” so  
 8 that people working on the project would stay focused on solutions. Sink Exh. K at 216:4-  
 9 217:22; Exh. O (BART General Manager Dugger Depo.) at 108:6-20. And when BART did want  
 10 the claim described more formally and thoroughly, it asked for “a very thick stack of papers” –  
 11 showing that BART did not believe that the claim was late or inadequately documented prior to  
 12 that, and waiving any issue with the claim’s timeliness or lack of compliance with formal  
 13 requisites. Sink Exh. L at 177:11-178:5 (BART manager LaBonte: BART did not believe that  
 14 the “thick file”/“big black book” claim was untimely, “We didn’t want them to work on the  
 15 formal process.”). Parties can agree to be less formal than the contract requires; frequently this is  
 16 good business practice. *Cf.* Sink Exh. KK (May 2002 BART document, concerning earlier  
 17 claims: “Supplier did not comply with the Potential Claim process described in P9.6 of the  
 18 contract . . . Engineer made a business decision to evaluate the claim, even though the claim  
 19 process was not adhered to.”). But by fostering a process of informality and encouraging GETS  
 20 to rely on that process to resolve the issues, BART cannot use the lack of formality as a bar to a  
 21 claim. *Galdjie*, 113 Cal. App. 4th at 1339 (“tacit approval” of a party’s non-compliance with  
 22 conditions precedent waives those conditions); *Ocean Servs. Corp.*, 15 Cal. App. 4th at 1775-76  
 23 (exchange of correspondence concerning potential settlement of contract claim both substantially  
 24 complied with claims statute and estopped public entity; “The claims statute may not be invoked  
 25 to penalize a plaintiff who at the behest of a public entity has been induced not to take action, but  
 26 instead to wait until the situation creating a conflict has stabilized.”); *Boas v. County of San*  
 27 *Diego*, 113 Cal. App. 3d 355 (1980) (failure to file timely government claim was excused where  
 28 plaintiff provided informal notice and was told that county would investigate, and not to take

1 further action until investigative report was completed).

2 Second, BART treated GETS's written submissions as sufficient. BART addressed  
 3 GETS' claims on the merits – first finding entitlement, then changing its mind when it saw the  
 4 price tag – never complaining that the claims were late or insufficiently documented or otherwise  
 5 not in compliance with the claims provision of the contract. Exh. O at 170:19-171:1. Instead the  
 6 parties worked together on trying to identify solutions and proposed contract changes that would  
 7 solve the problems and avoid the damage that GETS would otherwise suffer as a result of  
 8 BART's bad specifications. By failing to complain about any alleged insufficiency in the claims  
 9 process, BART waived any conditions that it now alleges were unsatisfied. *Galdjie*, 113 Cal.  
 10 App. 4th at 1340 (“staying in communication with respondent and approving and assisting his  
 11 efforts to locate a willing lender” waived condition of having financing in place); *Ocean Servs.*  
 12 *Corp.*, 15 Cal. App. 4th at 1777 (“Where, as here, a public entity fails to give notice of defects  
 13 regarding the content or timeliness of the claim, it ‘waives any defenses based on those  
 14 insufficiencies.’”); *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 41 (1975)  
 15 (treating non-compliant notice of claims as sufficient waived procedural non-compliance); *Cruise*  
 16 *v. City & County of San Francisco*, 101 Cal. App. 2d 558 (1951) (where injured person was in  
 17 contact with city officials and providing them requested information, and was not told that  
 18 information provided was insufficient or that more formality was required, city was estopped  
 19 from asserting claims notice bar).

## 20 CONCLUSION

21 For the foregoing reasons, the Court should deny BART's motion for partial summary  
 22 judgment.

23 Dated: April 9, 2010

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